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IN THE

Supreme Court of the United States

OCTOBER, 1958 TERM

No. 184

WESTLAKE HOSPITAL ASSOCIATION, an Illinois Corporation Not for Profit, ALFRED F. AKKERON, WALTER H. YOUNG, EDMUND G. BRUST, JR., EDMUND G. BRUST, SR., EDGAR M. ELBERT and GUY C. GUERINE,

Appellants,

vs.

EINAR BLIX, WEBSTER D. CORLETT, LAWRENCE MORENO, SAM RUBIN, R. W. SVENDSEN, A. EVERETT JOSLYN, JR., WILLIAM P. O'BRIEN and GERHART M. COLLATZ,

Appellees.

On Appeal from the Supreme Court of the State of Illinois.

MOTION TO DISMISS OR AFFIRM.

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Appellees, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, move to dismiss this appeal or to affirm the decision below on the grounds that (1) the constitutional question is not adequately presented; (2) the question presented is so unsubstantial as not to require further argument; and (3) the decision of the Supreme Court of Illinois is correct.

STATEMENT.

The Supreme Court of Illinois held that the board of directors which had been duly elected by the members of Westlake Hospital Association, a Not for Profit Charitable Corporation, (1) had, from the date the Association was organized, the right to amend the by-laws of the Association, (2) had that right exclusively from and after the passage of Section 9 of the Illinois General Not for Profit Corporation Act of 1944 (Chap. 32 Par. 163a-163a100 Ill. Rev. Stat. (1955)) and (3) validly exercised its right of amendment to provide for the election of directors by the directors instead of the members.

ARGUMENT.

The Constitutional Question Is Not Properly Presented.

The Supreme Court of Illinois construed only a few sections of the General Not for Profit Corporation Act of Illinois. Appellants, however, claim that the entire Act consisting of some 100 sections is unconstitutional as applied to them. (Jurisdictional Statement, Page 2) Jurisdiction of this appeal depends upon the determination of the validity of a state statute which has been questioned on constitutional grounds. At no time did appellants ever question or put into issue the validity of the entire Act as they seek to do in this appeal. Their failure to point out to this Court those particular sections of the Act which are invalid or in the alternative to show why the entire Act is unconstitutional should result in a dismissal of this appeal.

The Questions Presented Are Not Substantial.

The Jurisdictional Statement does not cite any legislative enactment which divested appellants or any other members of Westlake Hospital Association of any of their constitutional rights, nor does the Statement point out the manner in which the state legislature impaired the members' contract. Instead there is a general discussion of the importance of control of charitable corporations.

The discussion is meaningless because nowhere do appellants define "control". Control in the sense of the day to day management of the corporation's business is always exercised by the board of directors and not by the members. Fletcher, Private Corporations, Chap. 15, § 2104. The members of Westlake Hospital have no more right to exercise this form of control than do contributors to and members of such charitable organizations as

the American Red Cross, the National Polio Foundation and countless other similar organizations. There is no decision holding that such control is guaranteed by the Constitution.

If, on the other hand, appellants use the word control to mean that a contributor to a charitable corporation may control his donation so it is applied to the purposes for which it was intended, this appeal must fail because there is here no issue of the diversion of Westlake funds or resources from the charitable hospital purposes set forth in its charter. Neither the legislature of Illinois, its courts nor the board of directors of Westlake Hospital have exercised their power to destroy or disregard the donative intent of the hospital's contributors.

While it is true that charitable corporations occupy an important place in our society, it is equally true that they are creatures of the state and as such should be regulated and controlled by the state. The Supreme Court of Illinois in the present case recognized that the wisdom or extent of that regulation was a matter to be addressed to the state legislature rather than to the courts.

The Decision Below Was Correct.

The essence of appellants' complaint is that they were deprived of their right to elect directors. It has never been held that the right to vote for directors is a constitutionally protected right. The only case cited and relied upon by appellants to sustain their contention was reversed by the Supreme Court of New Jersey in *Rankin* v. *Newark Library Association,* 64 N.J.L. 265, 45 Atl. 622 (1900) where the Court in referring to the right of a stockholder in a library association to vote stated:

> "The right thus claimed is of little value. The charter and history of the association show that it was cr-

> ganized, not for pecuniary gain but for educational purposes, and that so long as the association was a going concern the shares of stock represented scarcely more than the holders' contribution to this benevolent object." 64 N.J.L. 267.

Although the New Jersey Court subsequently found it unnecessary to decide the exact nature of the stockholders' right to vote, that precise question was squarely presented and passed upon in *In re Mt. Sinai Hospital,* 250 N.Y. 103, 164 N.E. 871 (1928). There the New York Court of Appeals upheld the Act of the New York State Legislature amending the charter of the hospital taking from the members the right to elect directors and giving the board of directors the power to perpetuate itself. Judge Pound analyzed the nature of the right involved and held that it was not constitutionally protected. The court stated:

> "If their privilege to vote for trustees presents any evidence of ownership or vested right to share in the control of the corporation such as we associate with the idea of property, it may be beyond the power of the Legislature to take it from them. They had the bare right to vote for trustees because they were mere members of the corporation paying an annual membership fee. When they became members of the corporation they consented in advance to everything that could be done by legislative amendment to the charter which did not deprive them of their constitutional rights. They took the risk of a true amendment.
>
> "A member's right to voice in the management of a corporation may under conditions not presented here be a vested interest entitled to protection under the Constitution. *What vested interest does a mere voting member of a charitable corporation, devoted in part, at least, to public uses, have to protect of*

which he is deprived when he is deprived of his right to vote? Not, as in the case of the stockholders of a business corporation, property interests of his own, because he has no interest in the property of the corporation. If the corporation were dissolved, the funds would not be awarded to the individual members. The members do not invest their money. They give it to charity. Not the right of a founder, or one who contributes money under express conditions, to have the statutes of his foundation as to the powers of trustees or the terms of his conditions, strictly adhered to, except so far as he consents to their alteration. Appellants are not founders, nor did they attach any express conditions to the payment of their membership dues. Appellants are not asserting the right of the corporation to prevent the transfer of the corporate property from one board of trustees to another by the creation of a new corporation under a new charter, for no such transfer is attempted. The corporation continues to elect its own trustees. Nor are they asserting the right of the corporation to prevent diversion of the funds raised for the corporation; the corporation and its purposes remain intact. The voting power was exercised by the members for the benefit of the corporation. Appellants have no beneficial interest of their own to protect; no 'definite right secured to him [them] by a contract with the corporation' * * *." 164 N.E. 874-5. (Citations omitted; Emphasis supplied)

Regardless of how the right to vote for directors is characterized, the members, at the time the association was organized, gave to the board of directors of Westlake Hospital the power to amend the by-laws and thus to eliminate the members' voting rights. The members lost their voting rights not by any legislative enactment but by operation of Article 10 of the by-laws. The membership certificate provided on its face that the rights of members were subject to by-law amendments. (Record 3, Abst. 22).

Long before Westlake Hospital Association was organized it was settled law in Illinois that members of Not for Profit Corporations did not have the constitutional right to vote for directors nor indeed to vote on any particular matters whatsoever. *American Aberdeen-Angus Breeders' Association* v. *Fullerton,* 325 Ill. 323, 156 N. E. 314 (1927); *People Ex rel. Hoyne* v. *Grant,* 208 Ill. App. 235 (1917) aff'd 283 Ill. 391, 119 N.E. 344 (1918).

These decisions held that the corporation act under which Westlake was organized permitted the elimination of members' voting rights and permitted the directors to amend the by-laws. The passage of the General Not for Profit Corporation Act of 1944, the Act which appellants are challenging, effected no substantive change in this respect. But in any event, as the Supreme Court of Illinois pointed out, the legislature always retained the reserve power of amendment.

Respectfully submitted,

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